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No. _____

In The

Supreme Court of the United States

October Term, 1988

WILLIAM VELEZ,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

Whether the Connecticut Courts are incorrectly applying the Sixth and Fourteenth Amendment standard for giving a specific unanimity instruction in criminal cases.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	6

TABLE OF AUTHORITIES

Page(s)

CASES:

United States v. Echeverry, 698 F.2d 375 (9th Cir. 1983), *modified*, 719 F.2d 974 (9th Cir. 1983) 5

United States v. Gilley, 836 F.2d 1206, 1211 (9th Cir. 1988) 5

United States v. Murray, 618 F.2d 892 (2d Cir. 1980) 6

United States v. Payseno, 782 F.2d 832, 835-37 (9th Cir. 1986) 6

United States v. Ryan, 828 F.2d 1010, 1019-20 (3d Cir. 1987) 6

United States v. Schiff, 801 F.2d 108, 114-15 (2d Cir. 1986) 6

No. _____

In The

Supreme Court of the United States

October Term, 1988

WILLIAM VELEZ,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

William Velez, Petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court entered December 13, 1988, on which the Connecticut Supreme Court denied a petition for certification for appeal on February 9, 1989.

OPINION BELOW

The opinion of the Appellate Court of Connecticut is officially reported at 17 Conn. App. 186 (1988). It is

reproduced in the Appendix to this Petition beginning at App. p. A-1.

A timely petition for certification was denied by the Connecticut Supreme Court on February 9, 1989. That order was published on March 21, 1989, at 210 Conn. 810, and it is reproduced in the Appendix to this Petition beginning at App. p. B-1.

JURISDICTION

The judgment of the Connecticut Appellate Court, affirming Petitioner's conviction of two counts of risk of injury to a child and of sexual assault in the second degree was entered on December 13, 1988. A timely Petition to certify an appeal was filed with the Connecticut Supreme Court and denied by that Court on February 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part: "Nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

2. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

3. Section 53-21 of the Connecticut General Statutes provides as follows: "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

STATEMENT OF THE CASE

The Petitioner, William Velez, was convicted at a jury trial of two counts of risk of injury to children (C.G.S. § 53-21) and one count of sexual assault in the second degree (C.G.S. 53a-71a(a)(1)). The two alleged victims testified to incidents in which the Petitioner had shown them a frightening movie, had been in bed with them in a state of at least partial undress, and had touched their private parts. One of the alleged victims claimed the defendant had "put his private part in mine."

In its charge to the jury, the trial Court permitted the jury to convict the Petitioner of risk of injury either by placing a child "in such a situation that her morals were likely to be impaired" or upon finding that he "did an act likely to impair the health" of the child. The Court failed to instruct the jury, however, that it must be unanimous as to which of the two legal theories it applied.

The Connecticut Appellate Court rejected the Petitioner's appeal from the trial Court's failure to give a

specific unanimity instruction. The Appellate Court acknowledged that the risk of injury statute permits a defendant to be convicted on either of two different legal theories, but claimed that in the present case those theories were not conceptually different. The Connecticut Supreme Court declined to review the matter.

REASONS FOR GRANTING THE WRIT

In its charge to the jury, the trial Court pointed out that the Petitioner was charged with two counts of risk of injury and that he was charged in the conjunctive that he did "cause and permit . . . to be placed in such a situation that her morals were likely to be impaired *and* did an act to impair the health" of each alleged victim. The Court then charged the jury, however, that although in fact two separate crimes had been charged in each of the two counts, "proof beyond a reasonable doubt that the defendant violated either one or the other or both of the parts of that statute would be adequate to establish the defendant's guilt."

The trial Court totally failed to instruct the jury that it must be unanimous as to which of the two forms of risk of injury had been committed before it could convict.

The Connecticut Appellate Court, rejecting Petitioner's appeal on this issue, held that "the jury was required to determine only whether the defendant engaged in one course of conduct, namely, sexual activity with each victim, which could then, under the instructions of the Court, be allocated by the jury to either or both statutory prohibitions." The Connecticut Supreme

Court declined to review the matter. In so holding, the Courts plainly violated the commands of the Sixth and Fourteenth Amendments.

Federal courts have consistently held that, while a general unanimity instruction is sufficient in the majority of cases, "a different rule applies when a 'genuine possibility' of juror confusion exists." *United States v. Gilley*, 836 F.2d 1206, 1211 (9th Cir. 1988); *United States v. Echeverry*, 698 F.2d 375 (9th Cir. 1983), *modified*, 719 F.2d 974 (9th Cir. 1983).

In a case like this one, there is a clear conceptual distinction between doing an act likely to impair the morals of a minor and simply placing a minor in a place where her morals are likely to be impaired. On the facts of this case, some jurors may have voted to convict the Petitioner because they believed that he had indeed engaged in sexual contact with the victims. At the same time, these jurors may have believed that merely showing the girls a motion picture which apparently was sexually suggestive and allowing them to be in his bed with him did not constitute placing the girls in a position in which their morals were likely to be impaired. Other jurors, however, may have believed that there was no sexual contact but that showing the film and/or allowing the girls into the bed did constitute a violation of the statute. Under the circumstances, we will never know whether this jury was in fact unanimous in its factual determinations.

Thus, the Connecticut courts have refused to follow the commands of the Sixth and Fourteenth Amendments and have permitted this Petitioner to be convicted of

major felonies without any assurance that the jury convicting him was unanimous in its verdict. *See, United States v. Murray*, 618 F.2d 892 (2d Cir. 1980); *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986); *United States v. Ryan*, 828 F.2d 1010, 1019-20 (3d Cir. 1987); *United States v. Payseno*, 782 F.2d 832, 835-37 (9th Cir. 1986).

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX TABLE OF CONTENTS

Page

APPENDIX A

(Decision of Appellate Court) State of Connecticut v. William Velez, 17 Conn. App. 186 (Dec. 13, 1988) A-1

APPENDIX B

(Order on Petition for Certification to Appeal), 210 Conn. 810 (Feb. 9, 1989) B-1

APPENDIX A

Substitute information charging the defendant with two counts of the crime of risk of injury to a child and with the crime of sexual assault in the second degree, brought to the Superior Court in the judicial district of Stamford and tried to a jury before *Nigro, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *No error.*

John R. Williams, for the appellant (defendant).

Susan C. Marks, deputy assistant state's attorney, for the appellee (state).

BORDEN, J. The defendant appeals from the judgment of conviction, after a jury trial, of two counts of risk of injury to a minor in violation of General Statutes § 53-21,[1] and one count of sexual assault in the second degree in violation of General Statutes § 53a-71(a)(1).[2] He claims that the judgment of conviction must be reversed on the following grounds: (1) the trial court erred in admitting certain constancy of accusation testimony; (2) the trial court erred by prohibiting the defendant from presenting

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[1] General Statutes § 53-21 provides: "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

[2] General Statutes § 53a-71(a)(1) provides: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age. . . ."

certain evidence to impeach the credibility of the witnesses against him; (3) certain comments made by the assistant state's attorney during final argument undermined the requirement of proof beyond a reasonable doubt; and (4) the court's jury instructions permitted a verdict that was not unanimous. We find no error.

The jury could reasonably have found the following facts. The two female victims were E, age nine, and her sister, A, age seven. In the summer of 1986, their mother occasionally left them with the defendant while she went shopping with the defendant's wife. On one occasion, E was watching a movie entitled "Mother's Day" on a video cassette recorder in the defendant's bedroom, while A was playing in the living room. The defendant was wearing shorts but no shirt. E got under the bed covers with the defendant. The defendant unzipped E's pants, put his hand inside her pants and touched her genital area. He did not remove his shorts but he did expose his penis. On another occasion, the defendant took A into his bedroom, where he pulled down her pants and put his penis into her vagina.

I

The defendant first claims that the trial erred by admitting certain constancy of accusation testimony (1) because the testimony was not consistent with that of the victim, and (2) because the court did not make an "express finding" that the statements made by the victims to the witnesses were made at times when it w[illegible] natural for the victims to make them. We disagree.

The facts relevant to this claim are as follows. E told her younger sister, A, about the incident involving the defendant when it happened, but she did not tell anyone else until near Christmastime, when she told her babysitter, Brunilda Mercado. Both E and A testified that they had told their mother, a doctor, a police officer and a counselor about what the defendant had done to them. Over the defendant's objection and exception, these witnesses testified as constancy of accusation witnesses. Mercado testified that on December 29, 1986, E and A described to her what the defendant had done to them. Evelyn Vega, the mother of the victims, testified that near Christmastime, 1986, and later, when the victims were in counseling, they had told her what the defendant had done to them. Rosemary Klenk, a pediatrician, testified that she had examined the victims on January 5, 1987. Sergeant Robert S. Braccia of the Stamford police department testified that he had interviewed the victims on December 30, 1986. Similarly, Anna Badini, a psychologist, testified that between February and June, 1987, when she was treating the victims, they had described to her what the defendant had done to them. Each of these witnesses related the victims' descriptions of the defendant's conduct.

We first consider the defendant's argument that the testimony of the witnesses should have been excluded because in certain particulars it was inconsistent with the testimony of the victims. Although our Supreme Court has analyzed constancy of accusation testimony as "a subcategory of prior consistent statement evidence"; *State v. Ouellette*, 190 Conn. 84, 98, 459 A.2d 1005 (1983); neither the Supreme Court nor this court has required as a

condition of its admissibility that there be no inconsistencies between the victim's testimony and that of the constancy of accusation witness. The witness may recount the details of the statement made to him by the victim, provided that the victim first testifies "concerning the offense" and "identifies the persons to whom she made the statement." Id., 97. Any inconsistencies between the victim's testimony and the testimony of the witness are left to the jury for a determination of whether the victim was constant and consistent in relating what had happened to her. *State v. Brigandi,* 186 Conn. 521, 531, 442 A.2d 927 (1982).

The defendant also argues that the evidence was inadmissible because the court did not make an "express finding" that the statements by the victims to the witnesses were made at a time when it was natural for the victims to make them. The defendant does not argue that there was no evidence from which the court could make such an express finding. Rather, he contends that *State v. Ouellette,* supra, 99-100, requires such an express finding as a precondition to admissibility. This contention is based on language in *State v. Ouellette,* supra, 99, that before constancy of accusation testimony can be admitted, "the trial court must find, under the circumstances in each case . . . that the statement was made at a time when it was natural to make it. . . ." See also id., 100; *Bodak v. Masotti,* 14 Conn. App. 347, 354, 540 A.2d 719 (1988) (finding of impeachment by recent fabrication must be made before prior consistent statement can be admitted). The state argues that such an express finding is not a precondition of admissibility, and that any delay between the time of the offense and when the victim told the

witness is a matter of the weight of the testimony rather than its admissibility. *State v. Brigandi*, supra, 529. We need not resolve this dispute, however, because in this case the trial court did find, in effect, that the statements were made at the requisite time.

Mercado was the first constancy of accusation witness. In the trial court, the defendant, citing *State v. Ouellette*, supra, objected on the ground that the statements to Mercado were not made when it was natural for the victims to make them. The court overruled the objection noting the date of the victims' conversation with Mercado, and noting also that it must "[t]ake into consideration . . . that these are children under the age of sixteen who are making the complaint." It also noted that "out statutes . . . recognize that there may be a delay between the alleged act performed upon a child and the initial complaint."[3] We read this as the functional equivalent of a finding by the court that the statements were made to Mercado when it was natural for the victims to make them. Even if *State v. Ouellette*, supra, requires an appropriate finding by the court as a precondition to the admissibility of constancy of accusation testimony, we do not read it as requiring the talismanic use of the work "find" in its ruling. Whatever the contours of *Ouellette*, they are satisfied where, as here, it is clear that the court

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[3] The court was referring to General Statutes § 53a-69, which provides, inter alia, that where the victim of a sex-related offense is less than sixteen years of age, the time limitation for a complaint is extended to "within one year after a parent, guardian, or other competent person specially interested in the alleged victim learns of the offense."

considered the issue of the timing of the victim's statement and articulated on the record its determination that the timing of the statement was natural.

As to the testimony of the other constancy of accusation witnesses, there was no comparable colloquy between the court and counsel, because in each instance the defendant's objection consisted of a shorthand reference to his earlier objection, and the court's ruling, in similar fashion, referred to its earlier ruling.[4] Under these circumstances, we regard the court's rulings as having incorporated the finding it made earlier in overruling the defendant's objection to Mercado's testimony, This is particularly true because the evidence indicated that the victims told their mother immediately after telling Mercado, that they told Braccia the next day when their mother brought them to the police department, that their statements to Klenk were made only five days later, when she examined the victims, and that their statements to Badini were made over the next five months while she was treating them.

II

The defendant next claims that the court erred in two evidentiary rulings that he claims impaired his right of

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[4] For example, the following colloquy took place when Braccia testified: "Mr. Feinstein [counsel for the defendant]: Well, I will make the same objection that I made to the previous witnesses, please, Your Honor.

"The Court: All right. Same ruling.

"Mr. Feinstein: Thank you. Exception."

cross-examination and his right to present a defense. These claims are without merit.

The first claim concerns the defendant's cross-examination of Vega, the mother of the victims. She had testified that she and the defendant's wife, Nilda Velez, had had an argument two months before she found out about the defendant's conduct with her daughters, and that thereafter she did not bring her daughters to the defendant's house. The defendant asked what the fight was about. The court sustained the state's objection on the ground that the question concerned an issue that was "too peripheral" and irrelevant to the case.

The defendant claims that the court's ruling curtailed his right to cross-examine Vega for bias. He argues that his offer of proof at trial was that he would show that Nilda Velez had accused Vega of corrupting the victims by her own behavior, and that Vega fabricated her accusations against the defendant and influenced her daughters to do the same in retaliation against Nilda Velez. The defendant's argument, however, misdescribes the offer of proof at trial. The defendant's offer of proof was that the argument concerned the way that Vega was raising the children, and that "there is influence a child feels towards its parents when they see that the parent is being attacked by an outside party – that they will retaliate." Thus, the claim at trial was not that Vega had retaliated or influenced the victims to do so, but that the victims did so on their own in order to avenge the false accusation against their mother.

Thus, the defendant presents on appeal a theory of admissibility that was not presented to or ruled upon by

the trial court. He is not entitled to review of such a claim, and we decline to do so. *DiSorbo v. Grand Associates One Limited Partnership*, 8 Conn. App. 203, 208-209, 512 A.2d 940 (1986). The defendant does not challenge the propriety of the ruling made in response to the actual offer of proof. Furthermore, Vega testified that the argument did not take place in front of the victims, and neither the testimony of Nilda Velez nor that of the defendant supported the defendant's theory of admissibility as stated in the trial court. Thus, there is simply no basis on which to find error in the court's ruling.

The defendant's second evidentiary claim is that the court erred by excluding from evidence a certain video cassette recorder film entitled "Mother's Day," and the defendant's testimony regarding it. He argues (1) that the film would have impeached the credibility of E by contradicting her testimony regarding the film,[5] and (2) that the film and his testimony would have supported his defense, namely, that the victims had fabricated their stories, by establishing an independent source from which they could have imagined the activities they described in their testimony. We disagree.

E testified that she had watched the film at the defendant's house both on the day of the incident and on other occasions. She also testified that there was nothing in the film like what had happened to her. The defendant testified on direct examination that both victims had watched

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[5] Although the defendant in his brief refers to impeachment of both victims by contradiction of their testimony, he points only to the testimony of E regarding the film. We therefore consider the claim as limited to her credibility.

the film at his house. He then sought to introduce the film and to testify that the film portrayed a sexual assault on a woman dressed as a young girl. The court, after viewing the relevant portion of the film, found that it contained scenes of women bound and gagged, and of a woman, dressed in children's clothes, who was grabbed in a park, beaten, and had her blouse removed. The court found that it did not show a vaginal area, a penis, or a man on a bed with a young child. It also found that there was nothing in the film that was similar to what E had described in her testimony, and nothing that an eight or ten year old child would view as similar to the defendant's conduct with the victims as described by them. The court thus concluded that the film provided no foundation for the defendant's claim of contradiction and fabrication, and sustained the state's objection. The court's factual findings are fatal to both the defendant's arguments.

Whether extrinsic evidence contradicts testimony of a witness so as to require its introduction into evidence for impeachment purposes is within the trial court's discretion, subject to review only for abuse of that discretion. See, e.g., *L. F. Pace & Sons, Inc. v. Travelers Indemnity Co.*, 9 Conn. App. 30, 50-51, 514 A.2d 766, cert. denied, 201 Conn. 811, 516 A.2d 886 (1986). The trial court did not abuse its discretion in finding that the film and the defendant's description of it would not contradict E's testimony. Similarly, although a defendant has a due process right to present a defense; *State v. Bryant*, 202 Conn. 676, 704, 523 A.2d 451 (1987); that does not permit him to present evidence that is irrelevant or otherwise inadmissible. *State v. Rogers*, 9 Conn. App. 208, 214, 518 A.2d 399

(1986), cert. denied, 202 Conn. 806, 520 A.2d 1288 (1987). The trial court acted well within its discretion when it found, after viewing the film, that there was no similarity between the film and the victims' testimony. This finding is amply supported by the court's factual description of the film. Thus, the court was justified in rejecting the offer of the film and of the defendant's testimony as a basis for the defendant's claim of fabrication by the victims.

III

The defendant next claims that the assistant state's attorney undermined the requirement of proof beyond a reasonable doubt by arguing to the jury that the issue before it was whether to believe the defendant or the victims. The defendant seeks review of this claim under *State v. Evans*, 165 Conn. 61, 327 A.2d 576 (1973), because he did not object to the argument at the trial. Under our formulation for *Evans* review, we decline to review the claim fully because, although the defendant places a constitutional label on the claim, a limited review of the record clearly discloses that the claim is not truly of constitutional proportions and "is simply characterized as such by the defendant." *State v. Thurman*, 10 Conn. App. 302, 306, 523 A.2d 891, cert. denied, 204 Conn. 805, 528 A.2d 1152 (1987).

We first note that the defendant does not claim that the assistant state's attorney's argument constituted prosecutorial misconduct. Compare, e.g., *State v. Williams*, 204 Conn. 523, 535-36, 529 A.2d 653 (1987). His brief does not mention, and he specifically disavowed at oral argument

in this court, any such claim. Nor does he claim that the court gave a "comparative credibility" charge. Compare, e.g., *State v. Orsini*, 187 Conn. 264, 276, 445 A.2d 887, cert. denied, 459 U.S. 861, 103 S. Ct. 136, 74 L.Ed.2d 116 (1982). His claim is that the assistant state's attorney's remarks during final argument[6] should be viewed like jury instructions delivered by the court, and that the remarks so viewed undermined the state's burden of proof.

The functions of final argument by the attorneys and jury instructions by the court are obviously quite different. We know of no authority, reason or policy to equate the two in the context of this case. Even comparative

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[6] The specific remarks in question are as follows: 'This case boils down basically to credibility. [E] said that in the summer of 1986, William Velez touched her private parts with his hand in a certain way in a certain location in a certain manner under certain circumstances and she said he did. He says he didn't.

"[A] says that William Velez put his thing in her thing. She said on many occasions what she meant by that – she said it hurt. Mr. Feinstein asked if it hurt on the inside or the outside. She said that it hurt both on the inside and on the outside. William Velez says it never happened. The rest is very – you have to try and decide taking the other evidence into consideration, applying your common sense in your judgment about people, your judgment about character who to believe. You don't have to be an expert to do that.

* * *

"And then consider some of the things that I've said and decide today or whenever whether or not you can choose to believe Willie Velez and disbelieve [E] and [A]. I don't think that's a choice you have. But it's for you to decide, not me. Thank you."

credibility instructions by the court must be viewed in the context of the entire charge. Id., 277. Moreover, the jury was instructed that it was the court's duty to state the law, and that the arguments of counsel were not evidence and could be accepted or rejected by the jury. Furthermore, in this case the defendant testified that he never babysat for the victims and did not engage in the conduct that the victims described, and there was no circumstantial evidence, so that the remarks in question did not misstate the jury's ultimate task. In fact, the defendant's counsel argued essentially the same way to the jury. This record simply does not support the defendant's claim.

IV

The defendant's final claim is that the court's instructions permitted a verdict on the two risk of injury counts that was not unanimous. Although the defendant did not properly preserve this claim at trial, it is reviewable under *State v. Evans*, supra. *State v. Mancinone*, 15 Conn. App. 251, 273, 545 A.2d 1131 (1988). We reject the defendant's claim.

With respect to each victim, the information charged the defendant with violating General Statutes § 53-21 under both statutory theories, namely, placing a victim in such a situation that her morals were likely to be impaired, and doing an act likely to impair her health and morals. The court instructed the jury that proof beyond a reasonable doubt that the defendant violated either or both parts of the statute would suffice for a guilty verdict on that count. The court did not give a

specific unanimity instruction focused on each part of the statute.

With respect to E, the court charged that the state's evidence supporting the harmful situation theory was that the defendant partially undressed himself while alone with the victim in his bedroom, displayed his penis to her, pulled her pants down and had contact with her vagina. The court charged that the evidence supporting the harmful act theory was that the defendant touched the victim's vagina.

With respect to A, the court charged that the evidence supporting the harmful situation theory was that the defendant partially undressed himself while alone with the victim in his bedroom, displayed his penis to her and pulled her pants down so as to reveal her vagina. The court charged that the evidence to support the harmful act theory was that the defendant engaged in sexual intercourse with the victim, and had contact with the victim's vagina with his penis or hands.

The defendant argues that under the principles stated in *State v. Benite*, 6 Conn. App. 667, 507 A.2d 478 (1986), and its progeny; see, e.g., *State v. Jackson*, 13 Conn. App. 288, 535 A.2d 1327 (1988); the court was required to instruct the jury that its verdict must be unanimous with respect to each of the statutory theories, because the theories are conceptually distinct from each other. We conclude, however, that no such specific unanimity instruction was required in this case.

The specific unanimity instruction that the defendant seeks here "is required only where a trial court charges a jury that the commission of any one of several alternative

actions would subject a defendant to criminal liability, and those actions are conceptually distinct from each other, and the state has presented some evidence supporting each alternative." *State v. Benite*, supra, 674-75. The *Benite* rule "does not apply . . . where the multiple factual allegations do not amount to multiple statutory subsections or to multiple statutory elements of the offense." *State v. Mancinone*, supra, 274. "Where, however, the jury is presented with alternative, conceptually distinct statutory subsections, or with alternative, conceptually distinct elements of the same statute, as possible bases for guilt, the principles of *Benite* come into play, because it is in those situations that 'the possibility that the jurors may actually disagree on which alternative, if either, the defendant violated is the highest.' " Id., 276, quoting *State v. Benite*, supra, 674. Application of these principles to General Statutes § 53-21, the risk of injury statute, as it was presented to the jury under the facts of this case, leads us to conclude that no such specific unanimity instruction was required.

It is true that "General Statutes § 53-21 proscribes 'two general types of behavior likely to injure physically or to impair the morals of a minor under sixteen years of age: (1) deliberate indifference to, acquiescence in, or the creation of situations inimical to the minor's moral or physical welfare; see *State v. Smith*, 149 Conn. 487, 181 A.2d 446 [1962]; and (2) acts directly perpetrated on the person of the minor and injurious to his moral or physical well-being. See *State v. Coulombe*, 143 Conn. 604, 124 A.2d 518 [1956]; *State v. Silver*, 139 Conn. 234, 93 A.2d 154 [1952].' " *State v. Newton*, 8 Conn. App. 528, 532, 513 A.2d 1261 (1986), quoting *State v. Dennis*, 150 Conn. 245, 250,

188 A.2d 65 (1963). It is also true that these two general types of behavior have been viewed for purposes other than the unanimity requirement as separate and distinct. See, e.g., *State v. Dennis*, supra (specific intent not required for second part of the statute); *State v. Newton*, supra (impermissible enlargement of crime charged to instruct jury on both parts of statute when only one charged in information). We do not doubt that in an appropriate case the facts alleged by the state under one part of the statute could be conceptually distinct from the facts alleged under the other part.

Whether a specific unanimity instruction is required in any case turns, not only on the language of the two statutory subsections or elements, but also on the evidence in the case and how the case is presented to the jury in the court's instructions. See *State v. Jackson*, 13 Conn. App. 288, 294, 297, 535 A.2d 1327 (1988). Where the evidence indicates that varying actions of the defendant are not conceptually distinct from each other; see *State v. Mancinone*, supra, 277; or where the court's instructions eliminate any conceptual distinction; see *State v. Jackson*, supra, 296; a specific unanimity instruction is not required.

In this case, the two categories of the defendant's conduct, although stated by the court to fall within the two different statutory theories, were not conceptually distinct from each other. With respect to E, the defendant's conduct as presented to the jury under the first part of the statute was undressing both himself and the victim so as to reveal their genitals, and having contact with her vagina; under the second part, it was touching her vagina. With respect to A, the defendant's conduct

under the first part of the statute was undressing both himself and the victim so as to reveal their genitals; under the second part, it was engaging in sexual intercourse and having contact with her vagina by use of his penis or hands. These are not conceptually distinct actions. They both involve sexual activity by the adult defendant with the very young female victims, likely to be harmful to their physical, emotional and moral well-being. Cf. *State v. Mancinone*, supra (giving teenage girls liquor and marihuana not conceptually distinct activities).

Thus, this is not a case in which the jury, in order to determine whether the defendant was guilty under either or both of the two separate statutory subsections, was required to determine whether he engaged in two separate sets of conduct that were conceptually distinct. This is a case in which the jury was required to determine only whether the defendant engaged in one course of conduct, namely, sexual activity with each victim, which could then, under the instructions of the court, be allocated by the jury to either or both statutory subsections. Under these circumstances, the unanimity principles articulated in *Benite* do not apply.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

ORDERS

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210 *Conn.* 810

STATE OF CONNECTICUT *v.* WILLIAM VELEZ

The defendant's petition for certification for appeal from the Appellate Court, 17 Conn. App. 186, is denied.

John R. Williams, in support of the petition.

Susan C. Marks, deputy assistant state's attorney, in opposition.

Decided February 9, 1989

Supreme Court, U.S.
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MAY 24 1989
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No. 88-1749

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

WILLIAM VELEZ,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER, IN A CASE WHICH IS NOT FACTUALLY COMPLEX AND IN WHICH THE FACTUAL ALLEGATIONS ARE INTERRELATED AND NOT CONTRADICTORY, A GENERAL UNANIMITY INSTRUCTION IS SUFFICIENT TO PROTECT A DEFENDANT'S SIXTH AMENDMENT RIGHTS.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT . . .	4
1. This Court lacks jurisdiction as no substantial federal question was clearly raised and decided in the state courts.	4
2. The petitioner misstates the factual basis for his claim. .	7
3. The Appellate Court decision does not conflict with the decisions of this Court or the federal courts of appeal on the issue of jury unanimity. .	9
CONCLUSION	15

TABLE OF AUTHORITIES

CASES **PAGE**

Burch v. Louisiana, 441 U.S. 130 (1979) 9

State v. Benite, 6 Conn. App. 667, 507 A.2d 478 (1986) 13

State v. Jones, 193 Conn. 70, 475 A.2d 1087 (1984) 12

State v. Velez, 17 Conn. App. 186, ___ A.2d ___ (1988) 8

United States v. Ferris, 719 F.2d 1405 (9th Cir. 1983) 12

United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) 11, 12, 13

United States v. Ryan, 828 F.2d 1010 (3rd Cir. 1987) 12

United States v. Schiff, 801 F.2d 108 (2d Cir. 1986) 12

Whitney v. California, 274 U.S. 357 (1927) 6

STATUTES

Conn. General Statutes §53-21 2

RULES OF COURT

Supreme Court Rule 21.1(h) 4

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of Connecticut respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Appellate Court's opinion in this case. That opinion is reported at 17 Conn. App. 186 (1988).

JURISDICTION

As is discussed in the argument portion of this brief, infra, the petitioner has failed to demonstrate that a substantial federal question was properly raised and decided by the Connecticut courts. This Court therefore is without jurisdiction pursuant to 28 U.S.C. §1257.

STATEMENT OF THE CASE

The petitioner was charged with two counts of risk of injury to a minor in violation of Conn. Gen. Stat. §53-21 (Pet. at 3) and one count of sexual assault in the second degree.

One risk of injury count alleged that petitioner placed a nine-year-old girl in a situation where her morals were likely to be impaired and did an act likely to impair her health and

morals. The second risk of injury count was identical, except that it pertained to a different child. R. at 2.[1]

The jury was instructed that the risk of injury statute prohibited two general types of conduct: (1) placing a child in a situation and (2) doing an act. They were told that "[p]roof beyond a reasonable doubt that the defendant violates either one or the other or both of the parts of that statute would be adequate to establish the defendant's guilt." Tr. Nov. 13, 1987 at 76. The jurors were told that their verdict had to be unanimous.

As detailed in the Appellate Court opinion, (Petitioner's Appendix at A-1) the general allegations at trial were

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[1] R. refers to the certified record on appeal.

that petitioner took the girls into his bed on separate occasions and touched their genital areas. He had sexual intercourse with the younger child.

REASONS FOR DENYING THE WRIT

1. **This Court lacks jurisdiction as no substantial federal question was clearly raised and decided in the state courts.**

The petitioner has failed to comply with Supreme Court Rule 21.1(h) which required him to specify the stage of the proceedings at which his federal question was raised and the manner in which such question was raised and considered by the state courts. The respondent submits that petitioner's federal claim never was clearly presented to the state courts.

Viewed in isolation, the petitioner's Question Presented (Pet. at i) indicates his claim to be that the

body of Connecticut case law dealing with when a specialized unanimity instruction is required conflicts with federal authority. This claim was never raised before the state courts. At trial, the petitioner did not object to the general unanimity instruction that was given and did not request a specialized instruction. He made no mention of the unanimity issue at trial.

As review of the Appellate Court's opinion reveals (Pet. at A-13), petitioner's claim on appeal was that the giving of a specialized unanimity instruction was required by state law, not that the existing state precedent was incorrect as a matter of federal constitutional law. Even in his petition for certification to the Connecticut Supreme Court, petitioner never

suggested that the controlling Connecticut unanimity cases should be overruled. This question was never raised and decided by Connecticut courts and this Court is without jurisdiction to consider it. Whitney v. California, 274 U.S. 357, 360 (1927).

Although the Question Presented is to the contrary, the text of petitioner's argument suggests that his attack may be directed not to Connecticut's unanimity law as a whole but rather to the Appellate Court's ruling in this particular case. (Pet. at 5). Even in this event, however, petitioner has failed to demonstrate that a substantial federal question was raised and decided below.

As noted, supra, he made no unanimity claim whatsoever at trial.

On appeal, he argued only that a specific unanimity instruction was "constitutionally required" as "jury unanimity is an aspect of due process and, in Connecticut, of the state constitutional right to jury trial." (Def. Brief at 21). The Appellate Court opinion provides no guidance as to what extent, if any, it considered petitioner's generalized "due process" claim as opposed to his claim arising under the Connecticut constitution. On this record it cannot be said that petitioner demonstrated that a substantial federal question was raised and decided by the Appellate Court.

2. The petitioner misstates the factual basis for his claim.

The petitioner's argument appears to be premised upon the assertion that the jurors could have disagreed as to

the acts he committed; some may have convicted him because they believed he had sexual contact with the children while others may have convicted him because he allowed the girls to view a "sexually suggestive" motion picture. (Pet. at 5.) There is no factual basis for this assertion.

Contrary to the statements on pages 3-5 of the petition, the risk of injury counts were not predicated upon the viewing of any film by the victims. The only testimony before the jury relating to a film was that the older child had been watching a "scary movie" on the petitioner's video cassette recorder on several occasions. See State v. Velez, 17 Conn. App. at 193, n. 5; Pet. App. at A-8, A-9; trial transcript at 66. The jury never viewed any portion of the

film and the jury charge in no way reflected that the film could constitute the basis for criminal liability. As the Appellate Court opinion makes clear, the only predicate for the risk of injury charges was the petitioner's sexual contact with the victims. Pet. App. at A-13, A-15 to A-16.

3. The Appellate Court decision does not conflict with the decisions of this Court or the federal courts of appeal on the issue of jury unanimity.

Although this Court has made clear than conviction by a non-unanimous, six person jury deprives a state defendant of his right to trial by jury as guaranteed by the Sixth and Fourteenth Amendments, Burch v. Louisiana, 441 U.S. 130 (1979), no specific procedural requirements have been imposed on the states to implement this guarantee in

particular factual circumstances.

Specifically, this Court has not addressed the issue of what unanimity instruction is required when a single criminal code section prohibits several types of conduct. The respondent suggests that any bright - line resolution to the issue is impossible, as it must be resolved on a case-by-case basis in light of the legislative history, language, and state court interpretation of the statute in issue. It also must turn on the evidence presented to the jury in a given case.

Several federal circuit courts of appeal have considered the issue in general terms, and there appears to be no conflict among the circuits or between the Connecticut and federal courts regarding the general principles

applicable to its resolution. In United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), the court premised the need for a specialized unanimity instruction on whether the different statutory prohibitions were conceptually distinct; if one act by a defendant can be characterized by different jurors as violating different statutory provisions, the provisions are not sufficiently conceptually distinct to require a specialized instruction. Gipson, at 458. The purpose of a unanimity instruction is to ensure the jurors agree regarding the general factual basis for conviction; it is not to permit a defendant to avoid conviction merely because the jurors agree as to the conduct committed but disagree as to how such conduct should

be characterized within the statutory frame work. Id.

So long as the different bases for criminal liability contained in the statute are not inconsistent and the factual allegations are not unduly confusing, a general unanimity instruction has been regarded as sufficient. United States v. Ryan, 828 F.2d 1010, 1019 (3rd Cir. 1987); United States v. Schiff, 801 F.2d 108, 114 (2d Cir. 1986); United States v. Ferris, 719 F.2d 1405 (9th Cir. 1983).

Although Connecticut courts have ventured no opinion as to whether the Gipson holding is constitutionally required, the Gipson analysis has been regarded as analytically useful and has been implemented in our unanimity cases. See State v. Jones, 193 Conn. 70, 475

A.2d 1087 (1984); State v. Benite, 6 Conn. App. 667, 673-74, 507 A.2d 478 (1986).

The Appellate Court applied the Gipson analysis appropriately in the instant case. The court considered the two general types of behavior prohibited by the risk of injury statute: creation of a situation inimical to the minor's welfare and acts directly perpetrated on the minor and injurious to her. Viewed in light of the specific evidence presented in this case, the allegations were found to comprise only one course of conduct and not two separate actions that were conceptually distinct.

The allegations were that petitioner took two young girls into his bed on separate occasions and partially undressed them. He displayed his penis

to one girl and touched her vagina. He did these things to the second girl and also had sexual intercourse with her. The jury could find that the petitioner violated the risk of injury statute either by placing each victim in a situation likely to impair her morals or by doing an act likely to impair morals.

In these circumstances, the jury had to determine only whether the defendant engaged in one course of conduct, sexual activity with a child, which could then be allocated by jurors to one or both statutory subsections. This matter concerned a characterization issue, not a unanimity question, and there was no need for a specialized unanimity instruction. The Appellate Court opinion does not conflict with the decisions of the courts of appeals and

did not infringe the petitioner's right to trial by jury.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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